

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

July 15, 2009

E. Stephen Callaway, Esquire
Office of the Public Defender
14 The Circle, 2nd Floor
Georgetown, DE 19947

Stacey Cohee, Esquire
Department of Justice
114 East Market Street
Georgetown, DE 19947

RE: State v. Gary Akins
Defendant ID No. 0903008778

Dear Counsel:

The defense has filed a Motion to Suppress in this case seeking to exclude as evidence bags of marijuana taken from the Defendant incident to his arrest on criminal trespass occurring April 19, 2006, at the Carvel Gardens Apartment complex.

The issue before the Court is whether or not a housing authority or a property management company may ban or exclude an individual from a publicly subsidized housing property which would, in turn, subject that individual to arrest for criminal trespass should he enter onto the property.

The pertinent facts are taken from the filings of both parties.

On March 12, 2009, Laurel Police Department officers observed Mr. Akins on the premises of the Carvel Gardens Apartments. Having knowledge that Mr. Akins had previously been banned from the property, he was arrested for criminal trespass. At the police department, he was searched, and several bags of marijuana were found in his possession. The defense seeks to suppress the marijuana found incident to the arrest by alleging that the officers had no legal authority to arrest him for criminal trespass, as the ban was illegal.

Sometime prior to his arrest, Mr. Akins was provided a written notice advising him that he was not permitted on the Carvel Gardens property due to a prior incident. That notice also advised him that if he was on the property, he could be arrested for criminal trespass. Mr. Akins signed the notice and received a copy of same.

Carvel Gardens Apartments, the property in question, is not owned by the United States Government, but is owned by a private, non-profit entity for the purpose of providing low income subsidized housing. Mr. Akins was arrested on this privately-owned property.

Tenants at Carvel Gardens are required to sign a lease which contains a provision concerning the banning of certain individuals from the property. Those persons who have been banned are not to be invited onto the property. This provision concerning the banned list is included as part of the lease agreement and the rules and regulations concerning the property, which all tenants must accept.

DISCUSSION

The defense has offered two cases in support of its position but both ultimately support the State's position.

In *State v. Blair*, 827 P.2d 356 (Wash. Ct. App. 1992), Mr. Blair was conditionally banned from a public housing complex. He had been arrested for a drug transaction on the property and subsequently banned, But the ban was conditional, and only in effect if he was on the property but uninvited by a tenant or engaged in illegal activity. After this ban was in place, he was arrested for trespassing. In *Blair*, the Court upheld the ban but reversed the conviction, finding the police moved too quickly to arrest him because the ban was conditional. The police had an articulable suspicion to question him about why he was on the complex, but did not have sufficient information to determine if the conditions permitting him to be on the property existed. Hence, his immediate arrest was illegal.

In the case before the Court, there is no such conditional ban. It is absolute and based on prior criminal activity. Mr. Akins knew he could not be on the property or visit tenants residing at the Carvel Garden Apartments.

The second case supports the defendant's position, but it was later reversed by the U. S. Supreme Court. In *Commonwealth v. Hicks*, 563 S.E. 2d 674 (Jan. 2002), the Virginia Supreme Court was concerned about the friction between a ban or trespass policy and an individual's First Amendment rights. After being banned from a public housing complex, Mr. Hicks was arrested for trespassing when he was on the property to bring diapers for his child. He successfully argued to the Virginia Supreme Court that he had a First Amendment right to visit his family. But that is not the end of the story. The State notes that the case was ultimately decided in an appeal to the U. S. Supreme Court. In *Virginia v. Hicks*, 539 U. S. 121 (2003), the U. S. Supreme Court reversed the Virginia Court's decision because the arrest of Mr. Hicks and the policy for keeping off the property was not substantially related to restricting or prohibiting free speech. The ban was not overly restrictive and in this case did not implement First Amendment rights. This case does not support Mr. Akins.

In the present case, the condition that tenants agree to the “ban list” as a part of the lease agreement is not directly in play because Mr. Akins has not alleged he was an invited guest. Nevertheless, the State notes that such conditions have been upheld. *Williams v. Nagul*, 643 N. E. 2d, 816 (Ill. 1994).

I am satisfied that the focus of the ban in this case was for a proper and legitimate purpose, which was public safety. Mr. Akins was banned due to his prior arrest for criminal activity on the property. Mr. Akins was fully aware of the ban and had been warned of the consequences, i.e., an arrest for trespassing. The Defendant has not established that his arrest for criminal trespass was illegal.

The Defendant’s Motion to Suppress based upon the alleged illegality of the arrest is denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

THG:baj
cc: Prothonotary